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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

Alfred E. Ehm, Petitioner

v.

National Railroad Passenger Corporation

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Alfred E. Ehm, *pro se*
170 Carousel Drive
San Antonio, Texas 78227
512/673-8982

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QUESTIONS PRESENTED

1. May Amtrak, or any "agency" for that matter, lawfully disregard 5 U.S.C. § 552(c), which prohibits the withholding of information and the limitation of the availability of records to the public, *except* as specifically authorized by subsection (b) of the FOIA?

2. May a court of appeals properly hold, in the face of clearly expressed congressional intent to the contrary, that Amtrak is subject to the FOIA solely because of 45 U.S.C. § 546(g) and not because of the controlling definiton of "agency" given in 5 U.S.C. § 552(e)?

3. May a court of appeals properly hold, in the face of *Forsham v. Harris*, that Amtrak is *not* an "agency" as defined in 5 U.S.C. § 552(e), but that its records are nevertheless "agency records" for purposes of the FOIA?

4. May a court of appeals rule that Amtrak is not an "agency" as defined in 5 U.S.C. § 552(e), but nevertheless assess litigation costs against the United States under subsection 552(a)(4)(E)?

5. May a court of appeals properly disregard this Court's established doctrine that the reviser's notes are authorative in interpreting the United States Code?

6. May a lower court lawfully disregard 31 U.S.C. § 3526(d), which provides for the conclusiveness of all Comptroller General's decisions on the executive branch of the federal government, to be of no force and effect in respect to Amtrak?

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Alfred E. Ehm, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on May 29, 1984.

OPINIONS BELOW

The opinion of the court of appeals whose judgment is herein sought to be reviewed is reported at 732 F.2d 1250 (5th Cir. 1984) and is reprinted in pertinent part in Appendix A hereto, pages A-1 to A-11. The findings of fact and conclusions of law of the U.S. District Court for the Western District of Texas are also printed in Appendix A, *infra*, A-12 to A-14.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1984. Appendix A, *infra*, at A-17. A timely petition for rehearing was denied on June 28, 1984. *Id*, at A-18. This Court's jurisdiction is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These two cases involve—

1. The concept of equal protection of the laws inherent in the due process of law guaranteed every citizen of the State of Texas by the fifth amendment to the Constitution of the United States, which provides in pertinent part that "[n]o person shall be . . . deprived of life, liberty, or property, without *due process of law* . . . ." (Emphasis added.)

2. The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Appendix B, *infra*, A-19 to A-26.

3. Subsection 552a(a)(1) of the Privacy Act of 1974, which incorporates by reference 5 U.S.C. § 552(e). Appendix B, at A-26.

4. The FOIA's definition of the term "agency", 5 U.S.C. § 552(e), which governs the applicability of the Freedom of Information, Privacy, and Government in the Sunshine Act. Appendix B, at A-26.

5. The definitions of the terms "Government corporation" and "Executive agency" utilized in title 5 of the Code, 5 U.S.C. §§ 103 and 105. Appendix B, *infra*, at A-19.

6. 31 U.S.C. § 9101(2), which expressly designates Amtrak a "mixed-ownership Government corporation." Appendix B, at A-27.

7. 31 U.S.C. § 3526(d), which provides for the conclusiveness of all Comptroller General's decisions on the executive branch of the federal government. Appendix B, A-26 to A-27.

8. The summary of Comptroller General decision B-114829, 57 Comp. Gen. 773 (1978). Appendix B, *infra*, at A-28.

STATEMENT OF THE CASES

The first case, No. SA-81-CA-189, is an action brought by Ehm on April 3, 1981, pursuant to 5 U.S.C. § 552(a)(4)(B). The original complaint and the five proposed supplemental complaints sought to compel Amtrak to comply with a number of written requests for information, materials, and records required by paragraphs (a)(1) to (3) of the Freedom of Information Act to be published in the *Federal Register* or made available for public inspection. The complaints also sought to lift the blanket denial of Ehm's FOIA requests that Amtrak had instituted on November 11, 1981.

The second case, No. SA-81-CA-406, is an action under the Privacy Act of 1974 brought by Ehm on August 7, 1981, pursuant to 5 U.S.C. § 552a(g). The original complaint and the proposed supplemental complaint of November 9, 1982, sought to compel Amtrak to amend several records in accordance with

Ehm's request, to permit him access to certain records pertaining to him, to give the required notice in the *Federal Register* that it was maintaining "systems of records," and to promulgate the statutorily mandated implementing regulations.

THE FOIA CASE

Ehm petitioned the district court on April 3, 1981, to enjoin Amtrak from withholding certain information and records required to be made available under the FOIA. Amtrak replied on May 14 by moving for dismissal on the grounds that the complaint failed to state a claim upon which relief could be granted and that the court lacked subject-matter jurisdiction. On November 20, after Amtrak had reiterated its refusal to comply with the FOIA's (a)(1) publication and (a)(2) indexing and availability mandates and had also instituted a blanket denial of his FOIA requests, Ehm moved for leave to file a supplemental complaint, which motion Amtrak opposed.

On February 1, 1982, the court instructed Amtrak's counsel to either comply with Ehm's FOIA requests or state to the court by affidavit the reasons for withholding. Amtrak then tendered a number of documents, of which, however, only two pages were in fact responsive to the then pending FOIA requests. Having become aware that Amtrak had not complied with his oral instructions, the trial judge entered an order on March 11, in which he overruled all of Amtrak's objections and ordered the agency to release the requested information and records. Amtrak responded with a motion that the court reconsider and clarify its order.

Because Amtrak continued to adhere to its policy of routinely denying all of his FOIA requests, Ehm on February 2, 1982, and again on August 23, moved for leave to file a supplemental complaint. Amtrak voiced no objection and the court granted the second motion on September 10, but declined to require Amtrak to file an answer. The only apparent result of the filing of this supplemental complaint was that Amtrak became even more adamant in its refusal to consider any of Ehm's FOIA requests. After accumulating additional adverse FOIA determination and appeal responses, Ehm on September 15 and December

14, 1982, moved for leave to file additional supplemental complaints, which motions the court denied on May 4, 1983.

On May 2, 1983, the trial judge held a pretrial conference, at the conclusion of which he announced that he would order Amtrak "to produce what they have earlier refused to produce," but then failed to enter a written order to that effect. Appendix A, *infra*, A-13. Because the final judgment stated only that summary judgment is granted Ehm on the issues under the FOIA, but did not spell out the nature of the relief, Ehm found himself leaving the courthouse empty-handed.

Even though the Amtrak board of directors had in effect prevailed, they nevertheless appealed from the district court's order of May 4, 1984. The court of appeals rejected their contentions, but unfortunately also held that Ehm cannot pursue the claims raised in the five supplemental complaints because he had neglected to appeal from the trial court's summary denial of his applications for leave to file these complaints. The result of this improvident ruling is not only that Ehm is arbitrarily deprived of the important first amendment rights granted him by the FOIA, but also that the Amtrak board successfully thwarted clearly expressed congressional desire that the agency fully comply with the Act's various disclosure mandates.

THE PRIVACY ACT CASE

Ehm discovered in early 1981 that, in addition to other records on him, Amtrak was also maintaining a record which described how he had exercised a first amendment right—in clear violation of paragraph (a)(7) of the Privacy Act of 1974. Both Ehm's written request of February 10 that the document's author correct and amend the report and his follow-up request of April 27 remained unanswered. An appeal to corporate headquarters was responded to by the agency's law department that all correspondence pertaining to Privacy Act matters would remain unanswered and unacknowledged. Having thus exhausted his administrative remedies, Ehm on August 7 petitioned the district court to direct Amtrak to correct the record in question. Amtrak responded on October 16 by moving for dismisssal on

the ground that the complaint failed to state a claim upon which relief could be granted.

On March 9, 1982, after having discovered that the Comptroller General had ruled in 1978, *inter alia*, that Amtrak is subject to the Privacy Act because it *is* an "agency" as defined in 5 U.S.C. § 552(e), Ehm moved for a declaration that decision B-114829 is binding and conclusive on Amtrak. To this Amtrak objected on the ground that the Comptroller General's decision is erroneous as a matter of law.

Because the limitation of action provided for in paragraph (g)(5) of the Act did not allow further postponement, Ehm on November 9, 1982, moved for leave to file a supplemental complaint. The court denied this motion on May 4, 1983.

On April 15, 1983, the trial court denied Amtrak's motion to dismiss and concurrently ruled that the complaint turned on the single question whether or not Amtrak is a "Government controlled corporation" as defined in 5 U.S.C. § 103. In view of the fact that the Government Corporation Control law, chapter 91 of title 31 of the Code, expressly designates Amtrak a "mixed-ownership Government corporation," and 5 U.S.C. § 105 designates government corporations "Executive agencies" of the United States for purposes of title 5, Ehm assumed that the court had no choice but to rule that Amtrak is an "agency" as defined in 5 U.S.C. § 552(e). On May 2, however, following a brief pretrial conference, the court granted Amtrak summary judgment *sua sponte* on the ground that it is a private, for-profit corporation, *i.e.*, a "person" as defined in 5 U.S.C. § 551(2). The trial court did so without taking any proof and by relying almost exclusively on a decision of this Court that is only very marginally on point.

The court of appeals affirmed, specifically ruling "that Amtrak is not a 'Government controlled corporation' . . . within the meaning of 5 U.S.C. § 552(e)," but rather "a private nonfederally-chartered corporation." Appendix A, *infra*, at A-8.

In support of his argument that Amtrak is subject to the Privacy Act because it is indeed an "agency" as defined in 5 U.S.C. § 552(e) and because of clearly expressed congressional

intent that it be subject to the Act, Ehm relied upon Comptroller General's decision B-114829, which pursuant to 31 U.S.C. § 3526 [then 31 U.S.C. §§ 44, 71, and 74], possesses the force and effect of law and is conclusive on Amtrak. Appendix B, *infra*, A-26 to A-27. Amtrak countered that the decision is erroneous as a matter of law and that the corporation is not subject to the decision because it is not a component of the executive branch of the federal government. All of Ehm's urgings that decision B-114829 is binding and conclusive on Amtrak because of the mandate of 31 U.S.C. § 3526(d) were entirely disregarded by both the trial and the appellate court.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Confirm this Court's Ruling that a District Court Possesses no Equitable Jurisdiction to Permit an Agency to Withhold Information and Records which Do not Fall within 5 U.S.C. § 552(b)

A pivotal provision of the FOIA that is usually disregarded by litigants and courts alike is subsection 552(c), which provides that the Act "does *not* authorize withholding of information or limit the availability of records to the public, *except* as specifically stated in [section 552]." 5 U.S.C. § 552(c) (emphasis added). This provision has consistently been interpreted by the courts to mean that a district court possesses no authority to permit the withholding of the information, materials, and records required to be disclosed pursuant to paragraphs (a)(1) to (3) of the Act, unless withholding is expressly authorized by one or more of the nine narrow exemptions of paragraph (b).

This Court noted in two FOIA cases that the nine exemptions provided for in the Act "are explicitly made exclusive . . . and are plainly intended to set up concrete, workable standards for determining whether particular materials may be withheld or must be disclosed." *EPA v. Mink*, 410 U.S. 73, 79 (1973), *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1975). There is, consequently, little doubt that the trial court erred in permit-

tings Amtrak to adhere to its refusal to respond to Ehm's FOIA requests. "[A] district court has no equitable jurisdiction to permit the withholding of information which does not fall within one of the [FOIA's] exemptions." *Sears, Roebuck and Co. v. GSA*, 384 F.Supp. 996, 1003-1004 (D.D.C.), *aff'd*, 509 F.2d 527 (D.C. Cir. 1974). *Accord, American Civil Liberties Union v. Brown*, 609 F.2d 277, 280 (7th Cir. 1979); *Getman v. NLRB*, 450 F.2d 670, 672, 679 (D.C. Cir. 1971), 16 A.L.R.Fed. 499 (1973); *Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971); *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

The procedure for the judicial review of denial of FOIA requests was outlined in *Stein v. Dep't of Justice and FBI*, 662 F.2d 1246 (7th Cir. 1981), and *Antonelli v. FBI*, 536 F.Supp. 568, 571 (N.D. Ill. 1982):

> In practice, the review process proceeds in this manner. The agency has the burden of sustaining its claim of exemption. It can discharge that burden by the submission of affidavits that (1) describe the withheld documents and the justifications for non-disclosure with reasonably specific detail, (2) demonstrate that the information withheld falls logically within the claimed exemption, and (3) are not controverted by either contrary evidence in the record or by evidence of agency bad faith. *Military Audit Project v. Casey*, 656 F.2d 724 ([D.C. Cir.]1981); *Lesar v. Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980); *Hayden v. National Security Agency/Central Security Serv.*, 608 F.2d 1381 (D.C. Cir. 1979), *cert denied*, 446 U.S. 937 . . . (1980); *Terkel v. Kelly*, 599 F.2d 214. [(7th Cir. 1979), *cert. denied sub nom. Terkel v. Webster*, 444 U.S. 1013 (1980)]. If this burden is met, then summary judgment for the government is appropriate without an *in camera* review of the documents.
>
> The court has the authority to require the agency to create as full a public record as possible. This means a record which includes a description of the documents and a detailed justification of each claim of exemption from disclosure. *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The party seeking

the document can then criticize and analyze the detailed description and justification, and the party may conduct appropriate discovery in order to evaluate the claim of exemption. *See Phillipi v. Central Intelligence Agency*, 546 F.2d 1009, 1013 (D.C. Cir. 1976).
662 F.2d at 1253.

The trial judge followed this procedure by orally instructing Amtrak's counsel, a corporate staff attorney, in open court on February 1, 1982, to either respond to Ehm's FOIA requests or to indicate by affidavit the statutory exemption relied upon for withholding, and five weeks later overruled Amtrak's continuing objections by entering a written order to the same effect. Appendix A, *infra*, at A-15. He took no corrective action, however, after he had become aware that Amtrak had also declined to comply with his written order of March 11, 1982, thereby permitting the blanket denial of Ehm's FOIA requests that Amtrak had instituted in October 1981 to continue for an additional year. The trial judge also failed to enter an appropriate order after he had announced his intention, on May 2, 1983, to order the agency to produce the materials that it had refused to release for a period of three years, and on May 4 issued a final order which granted Ehm summary judgment on the issues under the FOIA, but required no specific performance on the part of Amtrak. Appendix A, *infra*, at A-13, A-16.

The court of appeals affirmed the grant of summary judgment for Ehm, but also held that the denial of Ehm's motions for leave to file several supplemental complaints was proper, which determination directly contradicts that court's ruling in the companion FOIA case, No. 83-1689, that "an agency's failure to 'make available to the public information,' as statutorily mandated under 5 U.S.C. § 552(a), constitutes a 'withholding' of that information . . . ." *Ehm v. NRPC*, 732 F.2d 1250, 1257 (1984). The unfortunate result of this affirmance of the summary dismissal of the supplemental complaints is that both Ehm and the public are thereby unconstitutionally deprived of the statutory right of access to the information and materials in question. That the agency head, the Amtrak board of directors, does not intend to respond to any of the FOIA requests at issue in this litigation—in spite of the Fifth Circuit's general determination

that they must comply—is indicated by the fact that they not only failed to respond in the course of the four months since the entry of the court's judgment, but also reiterated to Ehm their refusal to comply with one of the FOIA's important disclosure provisions, the (a)(2) indexing and availability mandates.

Because the court of appeals has rendered a decision in conflict with at least five decisions of other federal courts of appeals and has decided a federal question in a way in conflict with two applicable decisions of this Court, the petition for a writ of certiorari should be granted.

II.

Certiorari Should Be Granted to Confirm Congressional Intent that the Application of the Three "Open Government" Statutes Be Governed Solely by 5 U.S.C. § 552(e)

This Court confirmed in *EPA v. Mink*, 410 U.S. 73, 79 (1973), and *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-361 (1975), that the FOIA is an integral component of the Administrative Procedure Act because it is nothing more than an expansion of section 3, the "public disclosure" section, of that Act. Both the APA itself and its legislative history show clearly that the Congress intended the application of the Act to be governed exclusively by the generic definition of the term "agency" provided in section 2(a). See Attorney General's Manual on the Administrative Procedure Act (1947) at 9-12.

When the lawmakers expanded section 3 into the FOIA in 1966, they did not amplify the definition of "agency" then in force because they did not foresee that it would promptly be employed by numerous agencies to avoid compliance with the FOIA. Because 5 U.S.C. § 551(1) proved itself much too convenient for agency efforts aimed at avoiding FOIA compliance by simply denying agency-status, the Congress in 1974 strengthened Pub. L. 89-487, 80 Stat 250 (July 4, 1966), by actually naming the various kinds of establishments within the executive branch of the government that they thought to be included in subsection 551(1). Courts and commentators routinely assert

that subsection 552(e) "expanded" subsection 551(1), but it can readily be demonstrated that subsection 552(e) does not name a single kind of "agency" that is not in fact also encompassed by subsection 551(1), and that the only difference between the two definitions is that the one is exclusionary in character, whereas the other is enumerative. Appendix A, *infra*, at A-4, and 1 Fed. Info. Discl. (Shepard's) § 5.02 n. 2.

Federal Information Disclosure states that, when this Court examined the definition of "agency" in *Forsham v. Harris*, 445 U.S. 169 (1979), "it held that the § 552(e) definition was *controlling*" in determining the FOIA's applicability. 1 Fed. Info. Discl. (Shepard's) § 5.02 (Suppl.) (emphasis added). An examination of the *Forsham* decision indicates that the Court did not say so in as many words but only confirmed "that the disclosure obligations imposed by § 552(a)(3) were only intended to extend to *agency records*." 445 U.S. at 178 and n. 8 (emphasis added). Although the Court held only "that written data generated, owned, and possessed by a privately controlled organization receiving federal study grants that are not 'agency records' within the meaning of the Act . . . ," 445 U.S. at 171, it confirmed thereby that the Congress intended to keep not only "federal grantees" but *all* "persons" free from the direct disclosure obligations imposed by the FOIA. *Id.*, at 182.

That the lawmakers fully intended the applicability of the FOIA as well as that of the Privacy Act and the Government in the Sunshine Act to be governed by 5 U.S.C. § 552(e) exclusively, is readily apparent from the language and respective legislative history of these three statutes. The court of appeals disagreed, however, and held instead 1) that Amtrak is *not* an "agency" as defined in subsection 552(e), but rather a "private, nonfederally-chartered corporation", and 2) that it is subject to the FOIA solely because of the mandate of 45 U.S.C. § 546(g). Appendix A, *infra*, at A-3 n.3, A-5, A-8.

This ruling is erroneous for at least three reasons. First, it ignores the fact that the applicability of the entire Administrative Procedure Act, including the three "open government" laws, is controlled by the definition of the term "agency" set down in 5 U.S.C. §§ 551(1) and 552(e). Secondly, if Amtrak is indeed

a "person" as defined in 5 U.S.C. § 551(1), but is nevertheless subject to the FOIA, congressional intent that the Act's disclosure provisions apply only to the agencies named in subsection 552(e) would in effect be contravened. Congress carefully distinguished between "agency" and "person" for only one reason—to clearly establish who may avail himself of the rights and privileges of the APA and to prevent government agencies from evading compliance with the Act by simply denying agency-status. Thirdly, the ruling disregards the fact that the fourth and fifth amendment prevent the Congress from subjecting a "person" to the FOIA's disclosure provisions.

The Fifth Circuit's conclusions that Amtrak is a "person" for the purposes of the Administrative Procedure Act, but that the company is nevertheless subject to the FOIA—in other words, that it is both a "person" *and* and agency"—, and, secondly, that subsection 553(e) does not apply to Amtrak, contravene clearly expressed congressional intent to the contrary and should, for this reason, be overturned by this Court.

Because the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and, furthermore, has decided a federal question in a way in conflict with an applicable decision of this Court, the application for a writ of certiorari should be granted.

III.

Certiorari Should Be Granted to Uphold this Court's Ruling that only Records Owned and Controlled by an "Agency" Are "Agency Records" for Purposes of the FOIA

This Court confirmed in *Forsham v. Harris*, 445 U.S. 169 (1979), that the FOIA establishes the public's right of access to "Government information" only and that the Congress did not in any manner intend to make private records "agency records" under the Act. More specfically the Court stated "that data generated by a privately controlled organization which has received grant funds from an agency . . . , but which data has [*sic*] not at any time been obtained by the agency, are not 'agency records' accessible under the FOIA." In short, "[the] Congress

excluded private grantees from FOIA disclosure obligations by excluding them from the definition of 'agency'." 45 U.S. at 178, 179.

The court of appeals rejected this view and ruled instead that Amtrak is *not* an "agency," but that its records are nevertheless "agency records." The court based this self-contradictory determination on its view that 1) Amtrak is *not* an "agency" as defined in 5 U.S.C. § 552(e) because it is in fact a corporation that is neither owned nor controlled by the federal government; 2) even though Amtrak is a "person" as defined in 5 U.S.C. § 551(2), it is nevertheless subject to the FOIA because of the mandate of 45 U.S.C. § 546(g); 3) subsection 552(e) does not control the FOIA's applicability in this particular instance; and 4) the FOIA is to be read separately from and without consideration of any of the APA's other provisions. Appendix A, *infra*, A-2 to A-9.

The Fifth Circuit also agreed with Amtrak's claim that the corporation was not subject to the FOIA in 1972, a period when the Act's applicability was still governed by subsection 551(1) alone, and that Amtrak became subject to the FOIA's disclosure mandates only because of the enactment of section 3(b) of Pub. L. No. 92-316, 86 Stat. 228 (June 22, 1972). That this finding is incorrect is shown by the legislative history of 45 U.S.C. § 546(g), which states that this provision "was adopted after members of the Senate Commerce Commiteee and others had been made aware of several instances during [1971] in which Amtrak refused to make information available to the press and private citizens," that its enactment was brought about by the National Association of Railroad Passengers, Inc., a public-interest group, and that its authors had only heard of the FOIA, but were in fact unfamiliar with its actual provisions. Subsection 546(g) of the Rail Passenger Service Act is, therefore, of the same nature as 39 U.S.C. § 410(b)(1), which was amended in 1976 because the Postal Service had imprudently told the lawmakers that it would refuse to comply with the Privacy Act unless express language mandating USPS compliance was enacted.

Because the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided a federal question in a way in conflict with an applicable decision of this Court, the application for a writ of certiorari should be granted.

IV.

Certiorari Should Be Granted to Establish that the Court of Appeals May not Assess Litigation Costs Against the United States, if Amtrak Is a "Person"

Pursuant to its authority under 5 U.S.C. § 552(a)(4)(E), the court of appeals on May 29, 1984, assessed against the United States the "litigation costs" reasonably incurred by Ehm in contesting the Amtrak board's frivilous appeal of the district court's summary judgment of May 4, 1983. Appendix A, *infra*, at A-10 to A-11. At the same time the court ruled, however, that Amtrak is *not* an "agency" as defined in subsection 552(e), but rather a "a private, nonfederally-chartered corporation", *i.e.*, a "person" as that term is defined in 5 U.S.C. § 551(2). *Id.*, at A-8. Because this determination contravenes clearly expressed legislative intent that private recipients of federal funds be excused from the FOIA's disclosure obligations, it should not be permitted to stand.

The Congress distinctly provided for the assessment of "reasonable attorney fees and litigaton costs reasonably incurred in any case under [the FOIA] in which the complainant has substantially prevailed," but neither the actual language of the statute nor the Act's legislative history suggest even in the remotest sense that a court may assess attorney fees and litigation costs against the United States because of an ostensibly wrongful act on the part of an entity that is not an "agency" as defined in subsection 552(e).

If the Fifth Circuit finds that Amtrak arbitrarily and capriciously withheld information and materials which the FOIA requires it to currently publish in the *Federal Register* or promptly make available for inspection to "any person," and that the corporation frivilously appealed from the district court's sum-

mary judgment, the court has in effect confirmed that Amtrak is an "agency" for purposes of the Act, because subsection 552(a)(4)(B) authorizes a court to order the release of "agency records" only. Conversely, if Amtrak were indeed a private, for-profit corporation, as the court of appeals has held, the information, materials, and records in its possession, being proprietary in nature, would clearly not be accessible under the FOIA and the United States could not possibly be held financially liable for any unlawful withholding.

Because a federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, and has decided a federal question in a way in conflict with an applicable decision of this Court, certiorari should be granted.

V.

Certiorari Should Be Granted to Uphold this Court's Rule that the Reviser's Notes Are Authorative in Interpreting the United States Code

Ehm argued in the courts below that Amtrak is an "agency" as defined in 5 U.S.C. § 552(e) because it is a "Government controlled corporation" as defined in 5 U.S.C. § 103, and, secondly, that the term "Government controlled corporation" used in title 5 of the Code is synonymous with the term "mixed-ownership Government corporation" utilized in title 31. In support of his contention that Amtrak is indeed a federal government corporation for the purposes of title 5, Ehm relied upon section 804 of Pub. L. No. 91-518, 84 Stat. 1340 (Oct. 30, 1970), and 31 U.S.C. § 856 [now § 9101(2)], both of which expressly designate Amtrak a "mixed-ownership Government corporation" and subject it to the audit, deposit, and borrowing provisions of the Government Corporation Control Act of 1945. The stated purpose of that Act "is to provide annual scrutiny and current *financial control* by the Congress of the financial transactions and operations of the Government corporations through the regular fiscal agencies of the Government." S. Rep. No. 694,

79th Cong., 1st Sess. —, *reprinted in* [1940 U.S. Code Cong. & Ad. News, 890 (emphasis added). Nothing in the statute and its legislative history suggests that the Act applies in any manner to a private, for-profit corporation such as Amtrak claims to be.

The court of appeals rejected Ehm's contentions and held instead that 1) the fact that the Government Corporation Control law expressly designates Amtrak a "mixed-ownership Government corporation" does not mean that Amtrak is a "Government corporation" for the purposes of title 31 or any other title; 2) no "statutory nexus" exists between the "Government corporations" named in chapter 91 of title 31 and those referred to in title 5 of the Code; and 3) Amtrak is not a "Government controlled corporation" as defined in 5 U.S.C. § 103, but rather "a private, nonfederally-chartered corporation". Appendix A, *infra*, at A-7 to A-9.

In so ruling, the court disregarded the legislative histories of the FOIA and the Government in the Sunshine Act, both of which plainly state that the authors of those two statutes considered Amtrak to be a "Government controlled corporation" as that term is used is used in subsection 552(e). The court also rejected out of hand the *Citizen's Guide [to] the FOIA and the Privacy Act*, a legislative publication which expressly lists Amtrak among the "executive agencies" subject to both Acts. H.R. Rep. No. 793, 95th Cong., 1st Sess. 57 (1977).

To prove that the "Government corporations" defined in 5 U.S.C. § 103 and referred to in sections 105, 305, and 552(e), and other sections, of title 5 are indeed the "Government corporations" named in 31 U.S.C. §§ 846 and 856 [now §§ 9101(2) and (3)], Ehm pointed to the "cross references" appended to section 103 by the Law Revision Counsel of the House of Representatives. Appendix B, *infra*, at A-19. These cross references read in the 1976 edition of the *United States Code* in pertinent part as follows: "Government Corporation Control Act, see section 841 et seq. of Title 31, Money and Finance." Ehm argued that it was only reasonable to assume that the Law Revision Counsel would not have supplied this cross reference, *if* he had not intended to signify thereby that a definite relationship exists

between the "Government corporations" referred to in title 5 and those expressly named in sections 846 and 856 of title 31. The court of appeals declined to even consider this argument.

The lower court's acceptance of Amtrak's argument that the explanations and notes supplied by the Law Revision Counsel pursuant to his authority under 2 U.S.C. § 285b are of no consequence and may be disregarded, contradicts this Court's finding, however, that "[t]he reviser's notes are . . . obviously authorative in perceiving the meaning of the [United States] Code . . . ." *United States v. Nat'l City Lines, Inc.*, 337 U.S. 78, 81 (1948); *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 255 (1953). As the Second Circuit stated in *United States v. Thompson*, 319 F.2d 665, 669-670 (1963), "[the] reviser's notes . . . are authorative guides to congressional intent and to the proper interpretation of the statute[s]." *Accord, Acron Investments, Inc. v. Fed. Savings and Loan Insurance Corp.*, 363 F.2d 236, 240 (9th Cir. 1966). The Fifth Circuit's determination that the cross reference in question is of no consequence and that no connection exists between the "Government corporations" named in chapter 91 of title 31 and those referred to in this title 5 of the Code, should, consequently be reversed.

Because the court of appeals has rendered a decision in conflict with two decisions of other federal courts of appeals and has decided a federal question in a way in conflict with two applicable decisions of this Court, the petition for a writ of certiorari should be granted.

VI.

Certiorari Should Be Granted to Prevent the Setting of a Deleterious Precedent in Respect to the Force and Effect of 31 U.S.C. § 3526

The Comptroller General held in decision B-114829 that "[t]he legislative history of the 1974 FOIA amendments clearly establishes that Congress intended the term 'Government controlled corporation' to include Amtrak." 57 Comp. Gen. at 777 (1978). See Appendix B, *infra*, at A-28. By holding that Amtrak

is *not* a "Government controlled corporation" for the purposes of 5 U.S.C. § 552(e), the court of appeals

> in effect require[d] the Comptroller General 'to repudiate and disaffirm a decision which he regarded it his duty to make in exercise of that judgment which reposes in him by law, and require[d] him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make.'

Brunswick v. Elliott, 103 F.2d 746, 750-751 (D.C. Cir. 1939). This, however, the court cannot do because 1) it possesses no general supervisory power over the officers of the Government Accounting Office, and 2) decisions of the Comptroller General are "required to be based on an interpretation of statutes, and the Comptroller General's statutory duty to render a decision is not ministerial but instead is 'administrative' and 'quasi-judicial,' requiring for its proper performance the exercise of judgment and discretion." 103 F.2d at 750.

The practice of bestowing upon decisions of the Comptroller General the force and effect of law has been in effect for almost 100 years, the oldest pronouncement on the subject being a 1895 ruling by the Attorney General. 21 Op. Att'y Gen. 178. The question whether or not an executive agency may lawfully disregard 31 U.S.C. § 3526(d), which provides for the conclusiveness and finality of Comptroller General's decisions on the executive branch of the federal government, has apparently not come before this Court directly, but was dealt with in passing in at least four cases: *Real Estate Savings Bank of Pittsburg v. United States*, 16 Ct. Cl. 335, 352 (1880), *aff'd*, 104 U.S. 728, 733 (1881); *Miguel v. McCarl*, 291 U.S. 442, 445-456 (1934); *Pettit v. United States*, 203 Ct. Cl. 207, 448 F.2d 1026, 1031 (1973), *disapproved on other grounds sub nom. United States v. Testan*, 424 U.S. 392 (1975), *motion denied*, 425 U.S. 957 (1976); *Greene County Planning Board v. FPC*, 559 F.2d 1227, 1234 (2nd Cir.), *cert. denied*, 434 U.S. 1086 (1976).

Whereas the courts possess full authority to revise a decision of the Comptroller General that is clearly contrary to law, *Miguel, supra*, 291 U.S. at 456, and *Greene, supra*, 559 F.2d at 1234, they possess no authority to disregard congressional

will as reflected in the plain language of a statute. By disregarding the Comptroller General's finding, in decision B-114829, that Amtrak *is* an "agency" for the purposes of the three "open government" statutes and that the FOIA's and the Sunshine Act's legislative history clearly indicates congressional intent to include Amtrak, the court of appeals contravened the express mandate of 31 U.S.C. § 3526(d) that *all* decisions rendered by the Comptroller General be binding and conclusive on the executive branch of the government. However, the court cannot do so because it is always the duty of the courts "[to] obey the mandate of the law." *The Antelope*, 23 U.S. [10 Wheat.] 67, 114 (1825).

"There is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature, or no," held this Court in *Calder v. Bull*, 3 U.S. [3 Dall.] 386, 399 (1798), citing Blackstone verbatim, and in *Maxwell v. Moore*, 63 U.S. [22 How.] 185, 191 (1859), the Court admonished that "where the legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so." The court of appeals violated this imperative when it reached a finding directly opposite to that of the Comptroller General and disregarded the plainly expressed intent of Congress that all decisions of the Comptroller General be "binding and conclusive." 21 Op. Att'y Gen. 188 (1895).

The "evident and express words" of 31 U.S.C. § 3526 and its predecessors, 31 U.S.C. §§ 44 and 74, are that all decisions of the Comptroller General shall be "conclusive on the executive branch." By exempting the Amtrak board of directors from the operation of this express statutory provision, the court contravened the intent of Congress and violated the cardinal rule of statutory construction that, where the will or intention of the lawmaking power is declared in plain and unequivocal terms, such will or intent *must* be absolutely followed. *Binns v. Lawrence*, 53 U.S. [12 How.] 9, 17 (1851).

If this Court were to allow the court of appeals to disregard the express mandate of 31 U.S.C. § 3526(d),it would permit the setting of a dangerous precedent that could possibly hinder the

work of the Government Accounting Office. The GAO was made aware of the fact that the court had in effect declared section 3526(d) *inoperative* in respect to Amtrak, but took no corrective action. Nevertheless, the court's action sets a dangerous and deleterious precedent that should not be allowed to stand.

Because the court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, the petition for a writ of certiorari should be granted.

CONCLUSION

Wherefore, the petitioner respectfully prays that a writ of certiorari be granted.

Alfred E. Ehm, *pro se*
170 Carousel Drive
San Antonio, Texas 78227
512/673-8982

AFFIDAVIT OF SERVICE

I, Alfred E. Ehm, depose and say that I am the petitioner herein and that, pursuant to Rule 28.5(c) of the Rules of the Supreme Court, I served the foregoing petition on each of the parties on September 24, 1984, as follows:

(1) The National Railroad Passenger Corporation, the respondent, by handing three copies to a responsible individual in the office of Mr. Bond Davis, Esq., Amtrak Resident Attorney, at 1800 Frost Bank Tower, San Antonio.

(2) The Solicitor General, by mailing three copies, postage prepaid, to the U.S. Department of Justice, Washington, DC 20530.

All parties required to be served have been served.

/s/ Alfred E. Ehm
Alfred E. Ehm

STATE OF TEXAS)

COUNTY OF BEXAR)

Sworn to and described before me on September 7, 1984.

/s/ Anita Ellington
Anita Ellington,
Notary Public
State of Texas

[Seal]

My commission expires on May 6, 1985.

APPENDIX

Alfred Edward EHM, Plaintiff-Appellee
Cross-Appellant,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Defendant-Appellant
Cross-Appellee.

Nos. 83-1328, 83-1689

United States Court of Appeals,
Fifth Circuit.

May 29, 1984

Appeals from the United States District Court for the Western District of Texas.

Before CLARK, Chief Judge, and RUBIN and POLITZ, Circuit Judges.

CLARK, Chief Judge:

Alfred E. Ehm, proceeding pro se, brought various claims under the Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act, 5 U.S.C. § 552, against the National Railroad Passenger Corporation (Amtrak). These consolidated appeals present for review three orders in three different district court suits, two of which were consolidated below. We affirm the grant of summary judgment for Amtrak on the ground that Amtrak is not subject to the Privacy Act. We affirm the grant of summary judgment for Ehm requiring Amtrak to respond to Ehm's Freedom of Information Act requests notwithstanding Ehm's nonpayment of disputed fees. Finally, we vacate the district court's dismissal on the pleadings of Ehm's complaint seeking to require Amtrak to publish and make available to the public certain information allegedly in Amtrak's possession.

I. *Applicability of Privacy Act to Amtrak*

Ehm instituted this action pursuant to the Privacy Act, 5 U.S.C. § 552a.[1] He alleged that Amtrak had intentionally created inaccurate and misleading documents about him, had ignored his requests to amend these inaccuracies, had disclosed records about him without his consent and to his detriment, had denied him access to its records about him, and had failed to publish in the Federal Register notice of the existence of its system of records, all in contravention of the Privacy Act. He sought declaratory, injunctive, and monetary relief against Amtrak.

Amtrak moved for summary judgment on the ground that it was not an "agency" of the federal government, within the meaning of the Privacy Act. Summary judgment was granted in favor of Amtrak. We affirm.

The Rail Passenger Service Act, 45 U.S.C. § 501 et seq., authorized the creation of Amtrak as a quasi-public, for-profit corporation chartered under the District of Columbia Business Corporation Act. The statute specifically provides that Amtrak "will not be an agency or establishment of the United States Government." 45 U.S.C. § 541.

When the Rail Passenger Act was enacted in 1970, the Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act, 5 U.S.C. § 552, applied to federal "agencies" as defined in the Administrative Procedure Act, 5 U.S.C. § 551(1).[2] In 1972, Congress amended the Rail Passenger Service Act, adding section (g) of 45 U.S.C. § 546, to make Amtrak subject to the Freedom of

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[1]Ehm's amended complaint also stated common-law claims for fraud and deceit, and a claim for "monetary relief under the Fourth and Fifth Amendments, for invasion of personal liberty and property interests and for denial of procedural due process." These claims have been abandoned on appeal.

[2]5 U.S.C. § 551 defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . ," except for Congress, the courts, and other specifically enumerated government departments and agencies not pertinent here.

Information Act.[3] A plausible inference is that Congress recognized that Amtrak was not an "agency" within the meaning of the Administrative Procedure Act. Section (g) of 45 U.S.C. § 546 does not mention the Privacy Act.

In 1974, the Freedom of Information Act was amended to expand the definition of "agency" contained in 5 U.S.C. § 551(1), as follows:

> For purposes of this section, the term "agency" as defined in section 551(10 of this title includes any executive department, military department, Government corporation, *Government controlled corporation,* or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 552(e) (emphasis added). Because the Privacy Act defines "agency" by cross-reference to 5 U.S.C. § 552(e), *see* 5 U.S.C. § 552a(a)(1), the amended definition also applies to the Privacy Act.

The question before us is whether, as a matter of law, Amtrak is subject to the Privacy Act by virtue of this extended definition of "agency", despite the explicit provision in the Rail Passenger Service Act that Amtrak "will not be an agency or establishment of the United States Government," 45 U.S.C. § 541; or whether the inclusion of "Government controlled corporations" in the definition of "agency" under 5 U.S.C. § 552(e) can make Amtrak an "agency", as a matter of fact, for purposes of the Privacy Act.

A.

The legal side of this issue can be resolved by applying fundamental principles of statutory construction. The provision of the

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[3]Section (g) of 45 U.S.C. § 546 provides: "The Corporation shall be subject to the provisions of section 552 of Title 5."

The legislative history indicates the purpose of this amendment: ". . . in view of the substantial Federal funds which are going to Amtrak, the taxpaying public is entitled to access to information about the conduct of Amtrak affairs." S.Rep. No 756, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2393, 2397-98.

Rail Passenger Service Act denying Amtrak "agency" status is specific to that Act. Thus, it controls over the general definitional provisions of the Private Act absent clear legislative intent to the contrary. *See Morton v. Mancari*, 417 U.S. 535, 551-552, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974); *Bulova Watch Co. v.* United States, 365 U.S. 753, 758, 81 S.Ct. 864, 867, 6 L.Ed.2d 72 (1961). There is none. Furthermore, because enactment of this provision of the Rail Passenger Service Act preceded the extension of the "agency" definition in amended 5 U.S.C. § 552(e), the latter should not be read as controlling the former unless the two provisions exhibit

> a 'positive repugnancy' . . . . This principle rests on a sound foundation. Presumably Congress had given serious thought to the earlier statute . . . Before holding that the result of earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end.

Blanchette v. Connecticut General Insurance Corp., 419 U.S. 102, 135, 95 S.Ct. 335, 354, 42 L.Ed.2d 320 (1974), *quoting In re Penn Central Transportation Co.*, 384 F.Supp. 895, 943 (Special Court 1974) (Friendly, J.). The provisions do not exhibit a positive repugnancy.

Legislative history does not aid in the resolution of this issue, because an overall analysis shows it to be inconclusive.

Both the Senate bill and the report accompanying the House bill extending the definition of "agency" clearly contemplated that Amtrak would be made subject to the Privacy Act. Indeed, the Senate bill contained a definition of "agency" broader than the one ultimately adopted. It provided:

> For purposes of this section, the term 'agency' means any agency defined in section 551(1) of this title, and in addition includes the United States Postal Service, the Postal Rate Commission, and any other authority of the Government of the United States which is a corporation and which receives any appropriated fund.

S. 2543, 93d Cong., 2d Sess. § 3(e), 120 Cong.Rec. 17,015 (1974). The legislative history would support the conclusion that this

version was intended to have encompassed Amtrak.[4]

The "agency" definition contained in the House bill was identical to that now contained in 5 U.S.C. § 552(e). The report accompanying the original bill stated:

> The term 'Government controlled corporation,' as used in this subsection, would include a corporation which is *not* owned by the Federal Government, such as the National Railroad Passenger Corporation (Amtrak) and the Corporation for Public Broadcasting (CPB).

H.R. Rep. No. 876, 93d Cong., 2d Sess. 7-8, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6267, 6274 (emphasis in original).

This portion of the House Report sparked opposition on the House floor from Representatives Van Deerlin of California and Brown of Ohio, primarily over the first amendment implications of subjecting the Corporation for Public Broadcasting to government inquiry.[5]

Representative Moorhead of Pennsylvania, Chairman of the Subcommittee on Government Operations which reported the bill, responded with the observation that "the language of the statute would control over the language of the report." 120 Cong.Rec. 6805 (1974).

The Conference Report reconsidered the definition of "agency," and, while leaving the language of the House bill definition intact, narrowed its interpretation of that language. Specifically, whereas the House Report had indicated that Government-controlled corporations "such as" Amtrak and the Corporation for Public Broadcasting were intended to be included in the definition, the conferees stated that they did not "intend to include corporations which receive appropriated funds but are neither chartered by the Federal Government nor controlled by it, such as the Corporation for Public Broadcasting." S.Con.Rep. No. 1200, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Ad.News 6285, 6293.

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[4]Senator Kennedy observed during Senate debate: "The bill expands the definition of agency under the Freedom of Information Act to include the Postal Service, and Government corporations, such as the *National Railroad Passenger Corporation*." 120 Cong.Rec. 17,017 (1974) (emphasis added).

As we have observed, Amtrak was in fact already subject to the Freedom of Information Act by virtue of 45 U.S.C. § 546(g), enacted in 1972.

[5]*See* 120 Cong.Rec. 6805, 6813 (1974).

> During debate on the floor, Representative Moorhead, Chairman of the House conferees, explained that this language clarifies the intent of Congress with respect to the impact of this legislation on the Corporation for Public Broadcasting. The gentleman from California (MR. VAN DEERLIN) raised such questions during a colloquy when the bill was debated last March. This language makes it clear that the definition of 'agency' for purposes of Freedom of Information Act matters does not include the Corporation for Public Broadcasting.
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> 120 Cong.Rec. 34,164 (1974).[6]

The Conference Committee did not mention Amtrak specifically, nor had it been the object of debate. However, in rethinking the wisdom of subjecting the Corporation for Public Broadcasting to potential political inquiry, the Conference Committee apparently reconsidered the concept of "government control" which had underlain the House Subcommittee's assumption that the new definition would encompass both Amtrak and the Corporation for Public Broadcasting. The conferees determined that the Corporation for Public Broadcasting was in fact not under government control within the meaning of the definition. Because the House Report originally had recognized that the Corporation for Public Broadcasting and Amtrak were similarly situated in terms of government control, the redetermination with respect to the Corporation for Public Broadcasting, coupled with the omission of the reference to Amtrak originally contained in the House Report, tends to suggest at least a Congressional hesitancy to designate Amtrak a federal agency. This conclusion is strengthened by Congress's failure to modify 45 U.S.C. § 541, which provides that Amtrak will not be a federal agency or establishment.

In sum, the legislative history is inconclusive. Certainly in the early stages Congress intended to include Amtrak within the definition of "agency" contained in 5 U.S.C. § 552(e). How-

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[6]Representative Moorhead did indicate, however, that he had received assurances from the Corporation for Public Broadcasting that it "would follow the open government principles of the Freedom of Information Act in its information activities—even though they were not specifically covered by that act—so as to serve the public interest." 120 Cong.Rec.34,164 (1974).

ever, at the end of the legislative process, the ultimate Congressional intent is simply unclear. About all that can be said with assurance is that the legislative history offers no basis upon which to infer a modification or nullification of 45 U.S.C. § 541.

B.

We turn next to the factual question of whether Amtrak is a "Government controlled corporation," within the meaning of 5 U.S.C. § 552(e). This discussion assumes *arguendo* that 5 U.S..C. § 552(e) employs "agency" as a term of art and that it would not be inconsistent to deny "agency" status under 45 U.S.C. § 541 while simultaneously recognizing "agency" status, defined in terms of "Government controlled corporation," under 5 U.S.C. § 552(e).

Like the Corporation for Public Broadcasting, Amtrak is chartered under the District of Columbia Business Corporation Act, not under federal law. *See* 45 U.S.C. § 541. Three members of Amtrak's nine-member board are appointed by the President, with the advice and consent of the Senate. *See* 45 U.S.C. § 543(a)(1)(C). The Secretary of Transportation is an ex officio member, *see* 45 U.S.C. § 543(a)(1)(A), and as the current holder of Amtrak's preferred stock, also designates the two board members annually selected by the preferred stockholders. 45 U.S.C. § 543(a)(1)(E). Private commuter authorities select two members. 45 U.S.C. § 543(a)(1)(D). The remaining board member, the president of Amtrak, who serves as chairman of the board, is appointed by the board. 45 U.S.C. § 543(d). Hence the federal government is represented on the board directly by six members who can control the appointment of a seventh member, the president of the Corporation.

All ten members of the board of directors for the Corporation for Public Broadcasting, on the other hand, are presidentially appointed. Nevertheless, the Conference Committee indicated that for purposes of 5 U.S.C. § 552(e), this federal representation on the board was not contemplated to constitute government control. Presumptively, neither would federal representation on Amtrak's board constitute federal control under § 552(e). *Cf. Blanchette v. Connecticut General Insurance Corp.*, 419 U.S.

at 152, 95 S.Ct. at 363 ("Conrail is not a federal instrumentality by reason of the federal representation on its board of directors").

Amtrak's day-to-day operations are not subject to close government supervision. The officers and employees who conduct Amtrak's day-to-day affairs are not federal employees.

Amtrak has no rulemaking authority, other than the ability to prescribe rules for implementing the Freedom of Information Act.

Amtrak is defined as a "mixed ownership Government corporation," 31 U.S.C. § 9101(2)(A), and is thereby subject to federal audit and reporting requirements. This definition of "Government corporation," however, is expressly confined to Chapter 91, Subtitle VI, Title 31. There is no statutory nexus between this definition and the definition that pertains and is expressly confined to Title 5. *See* 5 U.S.C. § 103. We do not think that Amtrak's financial accountability to the federal government constitutes government control over Amtrak within the meaning of Title V. Rather, this accountability is necessary for Congress to monitor the accomplishment of its announced goal, *inter alia*, that Amtrak make "the most cost-effective use of employees, facilities, and real estate," and "minimize Federal subsidies." 45 U.S.C. § 501a(14). Although Title 31 does give the federal government a degree of financial control over Amtrak, we do not find that control sufficient in and of itself to negate Amtrak's character as a private, nonfederally-chartered corporation. *Cf. Blanchette v. Connecticut General Insurance Corp.*, 419 U.S. at 152, 95 S.Ct. at 363 (federal oversight of Conrail to protect federal financial interest did not render Conrail a government enterprise rather than a private one).

In light of the totality of these considerations,[7] we hold that Amtrak is not a "Government controlled corporation" as a mat-

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[7]Other courts have applied similar criteria in determining federal agency status. *See, e.g., Irwin Memorial Blood Bank v. American National Red Cross*, 640 F.2d 1051 (9th Cir. 1981) (Red Cross is not a federal agency for purposes of the Freedom of Information Act); *Rocap v. Indiek*, 539 F.2d 174 (D.C.Cir. 1976) (Federal Home Loan Mortgage Corportaion is a federal agency for purposes of the Freedom of Information Act.)

ter of fact within the meaning of 5 U.S.C. § 552(e). *Accord Held v. National Railroad Passenger Corporation*, ——— F.Supp. ———, No. 82-1717, at ——— (D.D.C. Jan. 23, 1984) (memorandum).

Therefore, we affirm the district court's grant of summary judgment for Amtrak on the applicability of the Privacy Act.

II. *Disputed Fees for Records Production*

Ehm instituted an action under the Freedom of Information Act, alleging that Amtrak had failed to respond to or improperly denied his requests for numerous specific records. By affidavit, Ehm stated that his problems began when he asked Amtrak officers to allow him to inspect Amtrak employment bulletins that he had seen displayed on a clipboard hanging on the wall behind the ticket counter at the San Antonio Amtrak office. When his request was denied, he submitted a Freedom of Information Act request to inspect these bulletins. James Stiner, Jr., Vice President of Corporate Communications at Amtrak, responded by asking for more specific information about the documents Ehm wished to inspect. Stiner's letter concluded, "Upon receipt of this information, the documents will be made available for inspection and copying." Ehm supplied the information. Shortly thereafter, Ehm received in the mail from Amtrak a large package containing hundreds of photocpies of Amtrak bulletins. Accompanying the photocopies was an invoice in the amount of $37.30 for fees assessed by Amtrak for record searches and photocopying. Ehm had not been informed beforehand of any charges that would attach to his request. Ehm states that he returned the materials within twenty-four hours of receiving them and refused to pay the fees.

Subsequent to this time, Ehm made numerous other Freedom of Information Act requests to inspect Amtrak records. Mr. Stiner sent Ehm a letter stating that Amtrak did not intend to respond to any of Ehm's past or future Freedom of Information Act requests until Ehm remitted $37.30 to Amtrak. Ehm has refused to do so.

Amtrak has not disputed any of these factual allegations. At the pre-trial conference, Amtrak's counsel conceded that "perhaps there was a misunderstanding" whether Ehm had in fact ever requested Amtrak to make photocopies for him or whether he had asked, as Stiner's correspondence seems to recognize, only to inspect the requested materials. Amtrak's counsel stated, "I think probably Mr. Ehm and I, if we had a chance to talk about it for a little while, we could probably straighten out . . . what I agree is a kind of petty issue of $37.00."

The trial judge responded, "I will cancel the $37.00 that they billed you [Ehm]. I will order them to produce what they have earlier refused to produce and for your not paying it. Will that satisfy you fellows?" Ehm responded, "Yes." The transcript shows no response of Amtrak's counsel. Thereafter, summary judgment was entered in accordance with the findings of fact and conclusions of law announced into the record, all further relief requested but not granted being denied.

On appeal Amtrak argues that the district court erred in ruling that Amtrak could not make its response to Freedom of Information Act requests contingent upon payment for materials provided in response to previous requests. The undisputed facts indicate that the charges arose from a "misunderstanding" on Amtrak's part. The trial court did not rule that Amtrak could not enforce its right to collect fees properly assessed, but that the fees at issue should be cancelled as improperly assessed. Amtrak made no objection to this ruling at conference. Amtrak's argument on appeal over this concededly "petty issue" is disingenuous.

Amtrak also argues that the district court erred to the extent that its judgment resolved issues other than Amtrak's duty to respond to Ehm's Freedom of Information Act requests. By its terms, the judgment resolved no issues other than Amtrak's duty to respond to Ehm's Freedom of Information Act requests. Any other relief that Ehm might have sought was specifically denied, and Ehm has not appealed that judgment. Amtrak's argument is without merit. Accordingly, we affirm the grant of summary judgment for Ehm on this issue. In accordance with 5 U.S.C. § 552(a)(4)(E), we assess against the United States litigation costs that Ehm has reasonably incurred in this discrete Freedom

of Information Act action.

III. *Dismissal on the Pleadings*

[Omitted]

Summary

We AFFIRM the district court's grant of summary judgment for Amtrak on the ground that Amtrak is not subject to the Privacy Act. We AFFIRM the grant of summary judgment for Ehm requiring Amtrak to respond to Ehm's Freedom of Information requests to produce documents, and award Ehm reasonable litigation costs under 5 U.S.C. § 552(a)(4)(E). We REVERSE and REMAND the dismissal on the pleadings of Ehm's suit arising under section 552(a) of 5 U.S.C., the Freedom of Information Act.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ALFRED E. EHM, No. SA-81-CA-406

vs.

NATIONAL RAILROAD
PASSENGER CORPORATION

[FINDINGS OF FACT AND CONCLUSIONS OF LAW]

[Pretrial Conference Held May 2, 1983]

THE COURT: I want to write a judgment and be finished with it. I am going to hold that AMTRAK is not subject to the Privacy Act, it is not a Government controlled corporation for the reason we have discussed heretofore and specifically on the strength of Dicta [*sic*] and Blanchette vs. Connecticut General Insurance Corporation, 95 Supreme Court reports, page 363, which says that Conrail is not an agency or instrumentality of the Federal Government. That is the statement in that case, even though its Board of Directors is controlled by members who are appointed by the President, and on the seven criteria mentioned in the Federal Home Loan Mortgage Corporation case, whatever that citation was, I find that based upon what you fellows have told me today, it is chartered by the District of Columbia, not the Federal Government; the Board of Directors is not controlled on a continuing basis by the Government of the United States but is instead appointed and not subject to removal for any purpose whatever. I don't even see that they are impeachable by Congress.

There is no close governmental supervision of the daily affairs of the corporation. The people that run the company are specifically under obligations not to be tied in any way with the

railway industry itself or with anyone doing business with the corporation. It is subject to federal audit for purposes of accountability and is a mixed ownership corporation, but by definition, mixed ownership excludes it from the category of being a wholly governmentally owned corporation.

The Act that created this financing arrangement in providing government control and for the designation for the Board of Directors, the Act itself excludes — Congress has done it's best to say "We are not an agency or instrumentality of the Government." That is very strong evidence of the fact that Congress has attempted to financially support this corporation, to provide for a rail service but at the same time try to put it on a profit making basis and let it operate as a private corporation subject, however, to appropriate governmental control and less than total governmental control, and the order denying defendant's Motion to Dismiss will not be recalled. I do find that the Act itself supplies the basis for determining whether National Railroad Passenger Corporation is a governmental corporation or a private corporation, and I will add the considerations of the legal underpinnings for this company into what was earlier done on the Order defendant's Motion to Dismiss. I will consider defendant's Motion to Dismiss then as a Motion for Summary Judgment, and from a study of the Act and my conversations with you gentlemen in court, realizing you don't have any substantial dispute among you about the basic facts, I am going to order a Dismissal with Prejudice in the case and a finding that the Private Act does not apply.

Mr. Ehm, you may appeal. The record would also reflect I have given your [*sic*] notice of appeal.

THE COURT: And you may appeal this to the Fifth Circuit and you will get the cooperation of my office in so doing.

That leaves us with the Freedom of Information Act. Mr. Ehm, I want to terminate this case. I will sign a Judgment that the Freedom of Information Act applies. I will cancel the $37.00 that they billed you. I will order them to produce what they have earlier refused to produce and for your not paying it. Will that satisfy you fellows?

THE COURT: O.K. 81, 406 is the Privacy Act case. That is dismissed with prejudice. Record that the plaintiff has given notice of appeal in open court.

On the other case - that was what, please? SA-81-CR-189. That is the Freedom of Information case, right? Alright. The plaintiff is the prevailing party in that case. The Freedom of Information Act is ruled applicable. What else can I do?

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ALFRED EDWARD EHM,
Plaintiff,

v. Civil Action No. SA-81-CA-189

NATIONAL RAILROAD
PASSENGER CORPORATION,
Defendant.

ORDER ON DEFENDANT'S REFUSAL
TO TENDER DOCUMENTS

Defendant has refused to tender to Plaintiff certain documents which Plaintiff has requested on the grounds that Plaintiff has failed to pay the sum of $37.00 to cover Defendant's cost in preparing and submitting copies of other documents. Because the amount involved is minimal, and because the ultimate responsibility for payment of same can be determined hereafter, and because such refusal delays the determination of the merits of Plaintiff's claim, Defendant's objection is overruled, without prejudice to reurging same when the merits of the case are taken under submission by the Court.

Signed and entered this 11 day of March, 1982.

/s/ Fred Shannon
United States District Judge

[Filed March 11, 1982]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ALFRED EDWARD EHM

vs.

NATIONAL RAILROAD
PASSENGER CORPORATION

SA-81-CA-406
(Consolidated with
SA-81-CA-189)

JUDGMENT

After holding a hearing in the above-styled and numbered cause on May 2, 1983, the Court hereby GRANTS summary judgment for the Defendant, National Railroad Passenger Corporation, on the issue the applicability of the Privacy Act of 1974, 5 U.S.C. § 552a, to Defendant.

Further, the Court hereby GRANTS summary judgment for Plaintiff on the issues brought under the Freedom of Information Act, 5 U.S.C. § 552. All further relief requested but not granted is hereby DENIED.

Signed this 4 day of May, 1983.

/s/ Fred Shannon
United States District Judge

[Filed May 4, 1983]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83-1328

D.C. Docket No. SA-81-CA-406

ALFRED EDWARD EHM, — Plaintiff-Appellee Cross-Appellant,

versus

NATIONAL RAILROAD PASSENGER CORPORATION, — Defendant-Appellant Cross-Appellee.

Appeals from the United States District Court for the Western District of Texas

Before CLARK, Chief Judge, and RUBIN and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel for defendant-appellant;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part; reversed in part, and that this cause be, and the same is hereby, remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that plaintiff-appellee shall recover that part of the costs attributable to the cross-appeal, and all other costs shall be recovered by the defendant-appellant.

May 29, 1984

ISSUED AS MANDATE: July 9, 1984

[Filed May 29, 1984]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1328

ALFRED EDWARD EHM, Plaintiff-Appellee
Cross-Appellant,

versus

NATIONAL RAILROAD
PASSENGER CORPORATION, Defendant-Appellant
Cross-Appellee

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING

(JUNE 28, 1984)

Before CLARK, Chief Judge, RUBIN and POLITZ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Charles Clark
Chief Judge

[Filed June 28, 1984]

5 U.S.C. § 103

§ 103. Government corporation

For the purpose of this title—

(1) "Government corporation" means a corporation owned or controlled by the Government of the United States; and

(2) "Government controlled corporation" does not include a corporation owned by the Government of the United States.
(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 378.)

CROSS REFERENCES

Government Corporation Control provisions, see section 9101 et seq. of Title 31, Money and Finance.

5 U.S.C. § 105

§ 105. Executive agency

For the purpose of this title, "Executive agency" means an Executive department, a Government corporation, and an independent establishment.
(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 379).

Freedom of Information Act, 5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by

which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying.

(A) final inspections, including concurring and dissenting opinions, as well as orders, made in adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued,

adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only of—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constitutent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of

Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether the disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and

recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on the appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working

days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request –

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact

properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes; but only to the extent that the production of such records would (A) interfere with enforcement records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting an lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

. . . .

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90-23, § 1, June 5, 1967, 81 Stat. 54; Pub. L. 93-502, §§ 1-3, Nov. 21, 1974, 88 Stat. 1561-1564; Pub. L. 94-409, § 5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95-454, § 906(a)(10), Oct. 13, 1978, 92 Stat. 1225.)

Privacy Act of 1974

§ 552a. Records maintained on individuals

(a) Definitions. For purpose of this section—
(1) the term "agency" means agency as defined in section 552(e) of this title [5 U.S.C. § 552(e)];

. . . .

(Added Dec. 31, 1974, Pub. L. 93-579, § 3, 88 Stat. 1897; Dec. 31, 1975, Pub. L. 94-183, § 2(2), 89 Stat. 1057.)

31 U.S.C. § 3526

§ 3526. Settlement of accounts

(a) The Comptroller General shall settle all accounts of the United States Government and supervise the recovery of all debts finally certified by the Comptroller General as due the Government.

. . . .

(d) On settling an account of the Government, the balance certified by the Comptroller General is conclusive on the execu-

tive branch of the Government. On the initiative of the Comptroller General or on request of an individual whose accounts are settled or the head of the agency to which the account relates, the Comptroller General may change the account within a year after settlement. The decision of the Comptroller General to change the account is conclusive on the executive branch.

31 U.S.C. § 9101 et seq.

§ 9101. Definitions

In this chapter—

(1) "Government corporation" means a mixed-ownership Government corporation and a wholly owned Government corporation.

(2) "mixed-ownership Government corporation" means—

(A) Amtrak.

. . . .

(Sept. 13, 1982, Pub. L. 97-258, §§ 1, 2(*l*)(1), 96 Stat. 1041, 1062; Jan. 12, 1983, Pub. L. 97-452, § 1(26), 96 Stat. 2478.)

Rail Passenger Service Act of 1970

SEC. 804. ACCOUNTABILITY.

Section 201 of the Government Corporation Control Act (31 U.S.C. 856) [now 31 U.S.C. 9101(2)] is amended by striking out "and" immediately preceding "(5)" and by inserting immediately before the period at the end thereof the following: "and (6) the National Railroad Passenger Corporation".

. . . .

(Oct. 30, 1970, Pub. L. 91-518, § 804, 84 Stat. 1340.)

Comptroller General Decision B-114829
57 Comp. Gen. 773 (1978)

National Railroad Passenger Corporation—Applicability of Freedom of Information, Privacy and Sunshine Acts

The National Railroad Passenger Corporation (Amtrak) is an "agency" for purposes of the Freedom of Information, Privacy, and Sunshine Acts, notwithstanding the statement of 45 U.S.C. 541 that Amtrak was not "to be an agency or establishment of the Government of the United States" since it is (1) headed by a collegial body—board of directors—the majority of whom are appointed by the President with the advice and consent of the Senate, and (2) a Government-controlled Corporation as that term is used in 5 U.S.C. 552(e). Furthermore, legislative history of Freedom of Information and Sunshine Acts indicates congressional intent to include Amtrak.